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No.____

IN THE

# Supreme Court of the United States

October Term, 1982

SIDNEY L. SOFFER,

Petitioner,

vs.

CITY OF COSTA MESA, JAMES T. WEIR and ROBERT R. CAMPAGNA,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## Questions Presented for Review

1. Whether the rights guaranteed to Petitioner by the due process clause of the Fourteenth Amendment to the Constitution of the United States were violated by the City of Costa Mesa by the actions of Costa Mesa Enforcement Officer James Weir and City Attorney Robert Campagna in depriving Petitioner of his vehicles without providing Petitioner a prior evidentiary hearing and/or a post evidentiary hearing to establish the fact of Petitioner's vehicles being abandoned, wrecked, dismantled, or imoperative pursuant to Chapter III, Article 6, Division I, Costa Mesa Municipal Code and Public Nuisances at which Petitioner could

confront and cross-examine any witnesses upon whose testimony the City would depend upon and at which Petitioner could present evidence on his own behalf.

2. Whether conditioning a probably cause hearing on the request of the individual is a reversal of usual due process.

3. Whether the Costa Mesa ordinance is unconstitutional on its face as it mandates a permanet deprivation of the vehicle if a request for a hearing is not initiated by the individual and it provides no definitions or standards for its enforcement.

4. Whether the towing of Petitioner's vehicles without a 10-day Notice fails to afford due process guaranteed to him by the 14th Amendment

5. Whether Section 23 of the California Vehicle Code extended the time that Petitioner had to initiate a Request for a Hearing, and if so, by the City failing to extend the time by four days, did the City deny Petitioner due process.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Sidney L. Soffer, your Petitioner, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the Judgment in the above case.

Ninth Circuit to review the Judgment in the above case.

## OPINIONS BELOW

No opinion was rendered by the Court of Appeals; its Memorandum is reproduced in Appendix A to this Petition. The Order denying the rehearing en banc etc. is reproduced in Appendix B to this Petition. There was no formal opinion of the District Court.

## JURISDICTION

The Memorandum of the Court of Appeals (Appendix A) affirming the Judgment of the District Court was filed on May 4, 1982. A timely Petition for Rehearing was denied on July 9, 1982.

The jurisdiction of this Court is invoked under 28 U.S. 1254 (i).

## STATUTES, ORDINANCE AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional, statutory provisions and ordinances are set forth in Appendix "D"; they are:

1. Fourteenth Amendment to the United States Constitution;

2. The City of Costa Mesa's Ordinance No. 73.13;

3. Section 23, California Vehicle Code

## STATEMENT OF CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. §1343 and §1331, this being an action arising under the Constitution and Laws of the United States.

In October of 1977, JAMES WEIR, enforcement officer for the City of Costa Mesa told Petitioner Sidney Soffer that three vehicles parked on Soffer's driveway were in violation of a City ordinance. Shortly thereafter Respondent Weir mailed three Notices of Intention to Abate and Remove Abandoned, Wrecked, Dismantled or Inoperative Vehicles or Part Thereof, as a Public Nuisance. The Notice gave Petitioner three options: 1) Remove said

vehicle (or part of a vehicle), 2) Request a public hearing or 3) Submit a sworn written statement denying responsibility for the presence of said vehicles (or parts of a vehicle) on said land with your reasons for denial. The Notice also stated: "You are hereby notified that, upon your failure to initiate at least one of the above actions within ten (10) days of the mailing of this notice, the City of Costa Mesa shall have the authority to abate and remove said nuisance without a public hearing and the costs thereof together with administrative costs, assessed to you as owner of the land on which said vehicle (or parts of a vehicle) is located." The Notice was mailed October 25,

1977. As the Notice contained no instructions as to the form of the Request for a Public Hearing, Petitioner circled option #2. Request a Public Hearing on all three notices and mailed them as instructed to James T. Weir, P.O. Box 1200, 77 Fair Drive, Costa Mesa, California 92626. Petitioner sent the three requests certified mail and they were postmarked November 4, 1977, ten calendar days from Octber 25, 1977 per instructions on the Notice. Nothing in the Notice indicated that "received within ten days" - a much stricter standard - would be used to judge timeliness.

As the three notices contained Petitioner's name and address and the date

mailed to Petitioner plus the "Request a Public Hearing" circled, Petitioner felt all the information to receive a public hearing was sent to the City. Four days later, November 8, 1977, Respondent Weir arrived at Soffer's house and informed Petitioner that he was there to tow away his three vehicles. In disbelief, Soffer tried to explain to Weir that he had timely mailed the Request for Hearing and his vehicles should not be towed away. Weir stated that the City Ordinance stated the Notices had to be received by the City within such 10 day notice not just postmarked. Soffer produced the three receipts for certified mail containing Weir's name and dated November 4, 1977,

but Weir said they were too late and anyway he, Weir, did not know what was contained in the three letters so the vehicles were to be towed. Soffer requested Weir to wait one day to allow Soffer to try and resolve the problem of the timeliness of the Notices but Weir refused. Soffer then phoned the City Attorney of Costa Mesa, Robert R. Campagna, hoping Campagna would tell Weir not to tow the vehicles. Soffer explained to Campagna that he had in fact mailed the three Notices on time and again requested one additional day to try and solve the problem. Campagna talked to Weir for three or four minutes on the phone and then told Soffer "Mr. Soffer, we have had trouble

getting your attention; and now that we have your attention, we are going to tow your cars away." At that time, Weir ordered the vehicles towed and against Petitioner's continued protests and without Warrant or Judgment or hearing, the three vehicles were towed away.

On November 21, 1978 Petitioner filed suit in the U.S. District Court, Central District of California for deprivation of civil rights, deprivation of property, without due process of law and conspiracy. Three amended Complaints plus Motion for Summary Judgment and many motions later, it went to jury trial. On January 9, 1981, the jury found in favor of Defendants and against Plaintiffs.

Petitioner timely filed a Motion for New Trial on January 11, 1981, on the following grounds:

1. The verdict of the jury was agin-st the clear weight of the evidence and a miscarraige of justice.

2. The failure of the Court to find that the Ordinance was unconstitutional resulted in confusing the jury as to the questions of fact to be decided by them.

3. The Plaintiff did not have ade-quate opportunity to review the jury in-structions and to contest Defendant's ob-jection to jury instruction D. On February 23, 1981, the Motion for New Trial was denied.

Petitioner filed a timely Notice of Appeal to the 9th Circuit Court of Appeal from Judgment entered on January 13, 1981 after filing timely Briefs and oral argument, the Court of Appeals filed a Memorandum on May 4, 1982 affirming the Judgment of the District Court. The issues presented to the Court of Appeals were as follows:

1. Whether the Ordinance is unconstitutional on its face.

2. Whether the Ordinance as applied denied to Appellant due process of law.

3. Whether the Court committed reversible error on May 21, 1982

Petitioner filed a timely Petition for a Rehearing and a suggestion for Rehearing en banc on the following grounds:

1. An apparent conflict with the decision of this court in Doe v. Gallinot No. 80-5658, decided September 10, 1981 (Slip opinion page 4860).

2. Soffer respectfully submits the court misapprehends the meaning of due

process and/or overlooked some of the facts.

3. Soffer respectfully submits that the question of jury instruction No. D (Appendix E) was handled poorly by both this court and by Soffer.

4. Soffer also respectfully submits that the court's memorandum does not address the issue as to whether or not Soffer's request for a hearing was timely.

5. Soffer respectfully submits that there is an apparent conflict with the decision of this court in Stypmann v. City of San Francisco 557 F. 2d. 1338 (Ninth Circuit Court of Appeals, 1977)

On the 9th day of July, 1982, the Court of Appeals filed a Denial to

Soffer's Petition for Rehearing and rejected the suggestion for a rehearing en banc.

## REASON FOR GRANTING THE WRIT

### 1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS AS TO THE PROPER INTERPRETATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. of the Fourteenth Amendment provides ..."Nor shall any State deprive any person of life, liberty, or property, without due process of law"...

In reliance upon what it conceived to be the principles established, the Ninth Circuit has here held that Notice and op-

portunity to be heard within the meaning of due process includes something less than prior notice of the inquiry, its purpose, the alleged violations, and the time and place of the hearing, with opportunity to be heard in person and to present witnesses and documentary evidence before a neutral and detached hearing body. Morrisesey v. Brewer 408 U.S. 471 (1971). The Ninth Circuit by focusing on the literal meaning of notice and opportunity to be heard has ruled that Petitioner had an opportunity to initiate a request for a hearing, thereby satisfying the requirements of due process. (See Notice to Abate Appendix C).

The Ninth Circuit here is also in direct conflict with other decisions of the Ninth Circuit, which held that conditioning a probable cause hearing on the request of the individual reverses the usual due process analysis and "the State must initiate the hearing and justify the deprivation. Doe v. Gallinot, 486 F. Supp 983, and affirmed by the Ninth Circuit Court of Appeals. Doe v. Gallinot, 657 F. 2d 1017. (Sept. 10, 1981). While Doe was concerned not with the deprivation of property, but of liberty, it stated "even in civil cases where the deprivation is of property rather than liberty, the State must initiate the hearing and justify the deprivation..."

In a case more on point, the Ninth Circuit has held that the "seizure of property without prior hearing has been sustained only where the owner is afforded a prompt post-seizure hearing at which the person seizing the property must at least make a showing of probably cause." Stypmann v. City of San Francisco, 557 F 2d 1338 (9th Cir. 1977). Stypmann was a vehicle tow case that held a City ordinance unconstitutional as well as the lien provisions of California Vehicle Code §22851 to be void insofar as they did not provide persons whose cars had been towed with a prompt and properly noticed post-seizure hearing at which vehicle owners could test the factual basis for the

tow. It should be noted that Stypmann has been cited and followed all over the county by Federal as well as State courts. On Sept. 28, 1979, Robert F. Peckham, Chief United States District Judge for the Northern District of California in a 30 page memorandum re Motion for Class Certification and Cross Motions for Summary Judgement, concluded and held that C.V.C. Sections 22702 (A), 22652(A) and 22657(c), as well as two municipal codes were unconstitutional as they violate due process because they do not provide for notice and a hearing prior to seizure. Judge Peckham followed the decision in Stypmann as well as other tow cases from other circuits. Judge Peckham also certified that all

judges concerned concurred in the within memorandum. Geanalds v. Nelson and Kemp v. Gain No. C-74-246 RFP and No. C-75-0993 RFP. U.S. District Court for the Northern District of California. Petitioner would like to point out that although it was not a Court of Appeals, it was a three judge panel and the most complete analysis Petitioner has read in over three years of reading cases on vehicle towing.

This decision is also in direct conflict with the California Supreme Court in its holding that "it has accordingly been held that to constitute due process the statute itself must provide for notice of the time and place of hearing...People v. Broad, 216 Cal. 1, at 7.

Although Petitioner could cite many more cases that are in conflict with the Ninth Circuit holding, Petitioner feels that if given the opportunity, a Brief would be the proper place.

The above conflicts justify the grant of certiorari to review the judgment below.

## 2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING DUE PROCESS

The Ninth Circuit's opinion in this case reflects what many courts have stated in the past. To quote only a few, "Due

process is a frequently explained and vaguely defined term. The Supreme Court's statement in Mathews v. Eldridge, 424 U.S. 319 at 333 (1976), is representative. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965)...The Fifth Circuit frankly describes the due process clause as "the elusive Fourteenth Amendment proscription on denial of property without due process of the law." Roane v. Callisburg Independent School District 511 F. 2d. 633, 635 (5th Cir '75). "Each case turns

almost entirely upon its facts." Burgess v. Miller 492 F. Supp. 1284 at 1290 (1980).

Burges, supra gives other examples and then concluded by stating, "the only universal requirement is that a person receive notice and an opportunity to be heard."

The plain meaning of the above statement has been mistakenly construed by the City of Costa Mesa, the District Court and the Ninth Circuit to mean an opportunity to initiate a request for a hearing.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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